

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
LARA V. CARLSON) FOIA Control No. 2015-601
On Request for Inspection of Records)

MEMORANDUM OPINION AND ORDER

Adopted: November 17, 2016

Released: November 17, 2016

By the Commission:

I. INTRODUCTION

1. By this Order we deny an Application for Review filed by Lara V. Carlson. Ms. Carlson asks for review of the Wireline Competition Bureau's (Bureau) decision granting in part and denying in part her Freedom of Information Act (FOIA) request. We conclude the Bureau properly denied in part Ms. Carlson's FOIA request.

II. BACKGROUND

2. The FOIA and Commission regulations give the public the right to request that an agency produce records that are not routinely available for public inspection. Generally, the agency must produce the requested records unless the agency determines that one or more of the FOIA's nine statutory exemptions apply. These exemptions are intended to protect certain records that are not suitable for release to the public, representing "a balance struck by Congress between the public's right to know and the government's legitimate interest in keeping certain information confidential." If an agency concludes that the requested records fall under a statutory exemption, the agency may deny the FOIA request and withhold those records from release. The FOIA and Commission regulations also provide that the requester may appeal such a denial and argue that the claimed exemption should not apply.

3. Ms. Carlson filed a FOIA request asking the Commission to produce the past three years of FCC Forms 499-A and 499-Q filed by TDS Long Distance Corporation and TDS Metrocom, Inc.

1 Letter from Lara V. Carlson to Office of General Counsel, Federal Communications Commission (filed Oct. 9, 2015) (Carlson AFR).

2 Letter from Kirk S. Burgee, Chief of Staff, Wireline Competition Bureau, Federal Communications Commission, to Lara V. Carlson (rel. Sep. 11, 2015) (Partial Denial Letter).

3 5 U.S.C. § 552(a)(3); 47 C.F.R. § 0.461.

4 5 U.S.C. § 552(a)(3),(b); 47 C.F.R. §§ 0.457, 0.461(f).

5 Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 925 (D.C. Cir. 2003).

6 5 U.S.C. § 552(b); 47 C.F.R. § 0.461(f)(1),(4)-(5).

7 5 U.S.C. § 552(a)(6)(A); 47 C.F.R. § 0.461(j).

(collectively, Metrocom).⁸ Forms 499-A and 499-Q are used to report historical and projected revenues for purposes of determining the reporting company's contribution to the Universal Service Fund.⁹

4. The Bureau partially granted and partially denied Ms. Carlson's request by releasing the requested documents but redacting information about telecommunications revenues, pursuant to Commission rules regarding the treatment of confidential information¹⁰ and FOIA Exemption 4.¹¹ Exemption 4 permits an agency to withhold third party commercial or financial information that is privileged or confidential.¹² For purposes of the records at issue here, records are confidential if the disclosure "is likely . . . to cause substantial harm to the competitive position of the person from whom the information was obtained."¹³

5. Ms. Carlson requests review of the Bureau's partial denial of her FOIA request. She argues that the Bureau failed to provide a detailed justification for invoking Exemption 4 because it did not explain the concrete and substantial injury that Metrocom would suffer if the information was disclosed.¹⁴ She also argues that her case is distinguishable from past instances where the Commission has withheld Forms 499 information because, Ms. Carlson says, unlike previous requesters, she does not represent a competitor to Metrocom.¹⁵ Finally, she argues in the alternative that even though the information may be protected by Exemption 4, the Bureau should have exercised its discretion and released the records.¹⁶

III. DISCUSSION

6. We conclude that the Bureau properly applied Exemption 4, and we find that the records in question are exempt from disclosure under the FOIA.

7. For Exemption 4 to apply, three criteria must be met: the records must be obtained from a third party, the records must be commercial or financial in nature, and the records must be confidential, as

⁸ Electronic FOIA Request Form, Lara Carlson (filed Jul. 01, 2015). On July 9, 2015, the Bureau notified Ms. Carlson of the estimated cost to process her request. Letter from NaKesha Woodward, FCC, to Lara Carlson, Hawks Quindel, dated July 9, 2015. Subsequently, on July 21, 2015, Ms. Carlson notified the Bureau that she wanted to narrow her request to "all FCC Forms 499-A and 499-Q filed in 2014 by TDS Metrocom, Inc."

⁹ Form 499-A is used to report historical revenues from the prior year. Form 499-Q is used to report historical revenues from the prior quarter and projected revenues for the upcoming quarter. *See* Universal Service Administrative Company, What and How to File, <http://www.usac.org/cont/filers/what-and-how-to-file.aspx> (last visited September 2, 2016);

¹⁰ 47 C.F.R. § 0.461(d)(3). The Bureau informed Metrocom of Ms. Carlson's FOIA request and on August 13, 2015, Metrocom filed a response opposing her FOIA request to the extent that financial information in the Forms 499 would be disclosed. Metrocom argued that disclosure of this competitively sensitive financial information would give its competitors a significant advantage by revealing sensitive revenue information at a level of detail not currently available to the public. Letter from Sara Cole, TDS Telecommunications Corp. to NaKesha Woodward, dated August 13, 2015 (Response Letter). In response, Ms. Carlson stated that obtaining a copy of Metrocom's Forms 499 "is necessary for Metrocom consumers to ensure that Metrocom is being truthful in its billing statements," and that disclosing the requested information will serve the public interest. Letter from Lara V. Carlson and Caitlin M. Madden, Hawks Quindel, to NaKesha Woodward, FCC, dated August 24, 2015.

¹¹ Partial Denial Letter at 1-2.

¹² 5 U.S.C. § 552(b)(4).

¹³ *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974); *see infra* para. 8.

¹⁴ Carlson AFR at 1-2.

¹⁵ *Id.* at 2.

¹⁶ *Id.*

that term is defined under Exemption 4.¹⁷ There is no question the records are from third parties (in this case, Metrocom)¹⁸ and that the information is financial in nature (the requested information is specifically the revenue information from Metrocom's submissions).¹⁹ The only remaining question is whether the records are properly categorized as confidential for purposes of Exemption 4.

8. When Exemption 4 applies, an agency may withhold material as confidential if it determines that disclosure is likely to cause substantial harm to the competitive position of the person from whom the information was obtained.²⁰ The test is satisfied by a finding of "actual competition and a likelihood of substantial competitive injury."²¹

9. We agree with the Bureau that releasing the information Ms. Carlson seeks would "give [Metrocom's] competitors a significant advantage by revealing sensitive revenue information at a level of detail not currently available to the public" and that "this information could be used, along with publicly available data, to determine the relative strengths and weaknesses in the markets in which [Metrocom] operates."²² Contrary to Ms. Carlson's arguments, this constitutes a concrete and substantial competitive harm that would flow to Metrocom if the records were released. Accordingly, and as the Bureau explained, withholding Forms 499 revenue information is consistent with FOIA, Commission regulations and the Commission's past FOIA decisions.²³

10. Ms. Carlson acknowledges that the Commission has traditionally withheld Forms 499 information, but argues that unlike previous requesters, she represents consumers and does not represent a competitor to Metrocom. Therefore, she argues, the records should be released to her due to her status. Ms. Carlson fails to recognize that the Commission has in fact withheld Forms 499 filings from non-competitors that filed FOIA requests.²⁴ Furthermore, Exemption 4 does not require that the instant requester have a competitive interest in order to justify the use of Exemption 4. With some limited exceptions not applicable here, the identity of the FOIA requester is immaterial to the agency's response.²⁵ In releasing records under the FOIA, an agency evaluates the application of FOIA exemptions not with regard to the particular requester, but rather "as if disclosure is to be made to the public."²⁶ This

¹⁷ See 5 U.S.C. § 552(b)(4).

¹⁸ See, e.g., *Nadler v. FDIC*, 92 F.3d 93, 95 (2d Cir. 1996) (including information received from corporations in the scope of Exemption 4).

¹⁹ See *Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1290 (D.C. Cir. 1983) (holding that "the terms 'commercial' and 'financial' in the exemption should be given their ordinary meanings.")

²⁰ See *National Parks and Conservation Ass'n v. Morton*, 498 F.2d at 770 and *Pub. Citizen Health Research Group v. FDA*, 704 F.2d at 1290-91. The Trade Secrets Act (18 U.S.C. § 1905) does not impose any additional requirement, inasmuch as it does not bar disclosure of material that is not exempt under Exemption 4. See *General Electric Co. v. NRC*, 750 F.2d 1394, 1401 (7th Cir. 1984).

²¹ See *CNA Financial Corp. v. Donovan*, 830 F.2d 1132, 1152 (D.C. Cir. 1987)

²² Partial Denial Letter at 2.

²³ *Id.* at 3, citing *Skybridge Spectrum Foundation et al.*, Memorandum Opinion and Order, 25 FCC Rcd 11064 (2010); *aff'd*, 842 F.Supp.2d 65 (D.D.C. 2012).

²⁴ *The Lakin Law Firm, P.C.*, 19 FCC Rcd 12727, 12730 (2004) ("It suggests that because Lakin, a law firm, is not a competitor of the carriers, disclosure to it would not result in competitive harm. However, as Qwest properly notes, the issue here is whether disclosure to the general public would result in competitive harm. As the Supreme Court recently observed in *National Archives and Records Admin. v. Favish*, '[i]t must be remembered that once there is disclosure, the information belongs to the general public.'" (internal citations omitted); see also *John E. Wall, Jr.*, 22 FCC Rcd. 2561 (2007) (requester claimed to seek Forms 499 data in the interest of MCI customers).

²⁵ See *Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 771 (1989) ("[T]he identity of the requesting party has no bearing on the merits of his or her FOIA request.")

²⁶ See *Havemann v. Astrue*, Civil Action No. ELH-10-1498, 2012 WL 4378143, at *11 (D. Md. Sept. 24, 2012).

is necessary because “[o]nce the records are released, nothing in FOIA prevents the requester from disclosing the information to anyone else.”²⁷ Thus, while Ms. Carlson may not represent the competitors of TDS Metrocom, that distinction does not affect our FOIA analysis.

11. Ms. Carlson argues in the alternative that even though the information may fall within the scope of Exemption 4, the Commission should exercise discretion and release the information for the sake of the public interest.²⁸ Pursuant to Section 0.457(d)(2) of the Commission's rules,²⁹ we will disclose records that we have found to be protected by Exemption 4 only upon a persuasive showing as to the reasons for inspection. Here, the Bureau has already released a redacted version of Metrocom's Forms 499 to Ms. Carlson. The redactions cover Metrocom's filings of sensitive aggregate revenue amounts, which, as stated above, are confidential. Ms. Carlson claims that her “request is made on behalf of consumers seeking to determine whether their telecommunications carrier is being truthful in its billing statements”³⁰ and cites the Commission's truth-in-billing rules.³¹ She asserts that consumers who pay USF fees on their Metrocom bills “have no way to determine whether this pass through fee represents the amount Metrocom must pay to the USF, or whether it is actually a hidden fee, without having access to the requested information.”³²

12. The Commission seeks to protect consumers by ensuring truthful billing practices with respect to carriers' USF contributions requirements.³³ This concern, among others, was the driving force behind the Commission's 2002 rule addressing carrier recovery of universal service costs from consumers.³⁴ That rule limited the amount that carriers can recover for their federal universal service contribution costs through a line item on a customer's bill to the interstate telecommunications portion of the bill times the relevant contribution factor.³⁵ Therefore, in order to determine if a universal service line-item charge on a billing statement is within this limit, a consumer needs to know the relevant contribution factor and the interstate telecommunications portion of his/her bill, neither of which is found in Forms 499.³⁶ Forms 499 contain aggregate information for a carrier rather than information about individual consumer bills or charges. Thus, the confidential information Ms. Carlson seeks, namely, Metrocom's filings of specific aggregated revenue amounts, would not serve the public interest she claims.

²⁷ *Swan v. SEC*, 96 F.3d 498, 500 (D.C. Cir. 1996).

²⁸ Carlson AFR at 2.

²⁹ 47 C.F.R. § 0.457(d)(2).

³⁰ Carlson AFR at 2.

³¹ *Id.*

³² *Id.*

³³ *Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9211-12, paras. 854-55 (1997) (“Carriers will calculate their contributions by multiplying their end-user revenues by the universal service contribution percentage announced by the Commission or administrator, so there will be no ambiguity regarding the cost associated with the preservation and advancement of universal service. To the extent that carriers seek to pass all or part of their contributions on to their customers in customer bills, we wish to ensure that carriers include complete and truthful information regarding the contribution amount.”).

³⁴ See 47 CFR § 54.712(a); see also *Federal-State Joint Board on Universal Service*, Report and Order and Second Further Notice of Proposed Rulemaking, 17 FCC Rcd 24952, 24976-79, paras. 45, 49-51 (2002).

³⁵ 47 CFR § 54.712(a) (“If a contributor chooses to recover its federal universal service contribution costs through a line item on a customer's bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer's bill times the relevant contribution factor.”).

³⁶ *Id.*; relevant contribution factors can be found at <http://www.usac.org/cont/tools/contribution-factors.aspx> (last visited September 6, 2016).

13. Additionally, the potential consumer harms that Ms. Carlson asserts³⁷ have another remedy. The Commission provides consumers who believe they may have been overcharged by their carriers with options for redress that do not include the public release of confidential information that would result in competitive harm.³⁸ In sum, Ms. Carlson has failed to present any persuasive reasons why the Commission should release Metrocom's confidential financial information, and our own examination of this matter does not disclose any public interest justification that would outweigh the competitive harms to Metrocom. Therefore, we find that the Bureau properly refrained from exercising its discretion to release the information.

14. In summary, we determine that the Bureau properly denied Ms. Carlson's FOIA request and correctly applied Exemption 4 to withhold the records in question.

IV. ORDERING CLAUSE

15. ACCORDINGLY, IT IS ORDERED that the Application for Review filed by Lara V. Carlson IS DENIED. Ms. Carlson may seek judicial review of this action pursuant to 5 U.S.C. § 552(a)(4)(B).³⁹

16. The officials responsible for this action are the following: Chairman Wheeler, and Commissioners Clyburn, Rosenworcel, Pai, and O'Rielly.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

³⁷ *Id.*

³⁸ Indeed, consumers who suspect they may be charged hidden fees or overbilled, may file complaints with USAC (<http://www.usac.org/about/tools/contact/complaints.aspx>) (last visited September 22, 2016) or via the FCC's Consumer Help Center (<https://consumercomplaints.fcc.gov/hc/en-us>) (last visited September 22, 2016).

³⁹ We note that as part of the Open Government Act of 2007, the Office of Government Information Services (OGIS) was created to offer mediation services to resolve disputes between FOIA requesters and Federal agencies as a non-exclusive alternative to litigation. Using OGIS services does not affect Ms. Carlson's right to pursue litigation. Ms. Carlson may contact OGIS in any of the following ways:

Office of Government Information Services
National Archives and Records Administration
Room 2510
8601 Adelphi Road
College Park, MD 20740-6001
E-mail: ogis@nara.gov
Telephone: 301-837-1996
Facsimile: 301-837-0348
Toll-free: 1-877-684-6448.